No. 22,538

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MECHANICAL SPECIALTIES, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION TO REVIEW AND SET ASIDE AND ON CROSS PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATUTE:

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ISSUES PRESENTED

1. Whether substantial evidence on the whole record supports the Board's finding that the Company violated Section 8(a)(1) of the Act by granting wage increases to discourage union support; interrogating employees as to union activities; and threatening employees with plant closure and loss of jobs if they selected the Union.

2. Whether substantial evidence on the whole record supports the Board's finding that the Company dominated and interfered with the employees' grievance committee in violation of Section 8(a)(2) and (1) of the Act.

3. Whether substantial evidence on the whole record supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Alfred Cantrell and Irving Klein for their union activities.

4. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union which represented a majority of its employees in an appropriate unit.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Mechanical Specialties, Inc. (hereafter, the Company) to review, and on cross-petition of the National Labor Relations Board to enforce, an order of the Board issued on June 28, 1967, against the Company, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*). The Board's Decision and Order (R. 23-42, 66-69)[1] is reported at 166 NLRB No. 31. This Court has jurisdiction under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Los Angeles, California, within this judicial circuit.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company threatened and coerced employees in violation of Section 8(a)(1) of the Act by granting wage increases to combat union organization, interrogating employees about their

[1] References to the pleadings, Decision and Order of the Board, the Trial Examiner's recommended Decision and Order and other papers reproduced as Volume I, Pleadings, are designated "R". References to portions of the stenographic transcript reproduced pursuant to the Rules of the Court are designated "Tr." "GCX" refers to the General Counsel's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

union sympathies, and threatening plant closure and loss of jobs if the employees selected the Union.[2] The Board further found that the Company violated Section 8(a)(2) and (1) of the Act by dominating and interfering with an employee grievance committee, a labor organization within the meaning of the Act. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Alfred Cantrell and Irving Klein to discourage union activity. Finally, the Board found that the Company refused to bargain with the Union, which represented a majority of the employees, in violation of Section 8 (a)(5) and (1) of the Act. The evidence on which these findings rest is summarized below.

A. The Union campaign

In the fall of 1964, the Union began a campaign to organize employees of tool and die shops throughout Southern California (R. 24; Tr. 698). The Company, which fabricates tools and other items in its Los Angeles plant (R. 24, 7, 16), became aware of this general campaign in December of 1964 (R. 24; Tr. 753-754).

On February 28, 1965, the Union held a meeting for employees from a number of tool and die shops in the area, including the Company (R. 24; Tr. 693-694, 697-698). Vincent Sloane, the Union representative in charge of the campaign, spoke to the employees (R. 24; Tr. 694). Cards authorizing the Union to bargain collectively on behalf of the signers and explanatory material were distributed (Tr. 698-700, GCX 37). Sloane explained that the purpose of the cards "in the first instance was to obtain

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[2]International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

representation by the UAW for the employees in the plant" (Tr. 694-695). He also advised those present of the procedure leading to recognition and read from a form letter sent by the Union to another employer requesting recognition on the basis of a card majority (Tr. 695, GCX 36). However, he explained that recognition would probably come about through a Board election (R. 25) because, as he stated, in his experience, employers normally did not recognize unions on the basis of cards and "in all probability we would have to go the route of an election" (Tr. 697).[3]

B. The Company interrogates employees and grants wage increases to combat the Union; the Company president also tells assembled employees that the Company could close because of the Union and suggests the formation of a grievance committee which is immediately formed and dominated by the Company

The Company first learned that the Union was seeking to organize its employees on about February 22, 1965, (Tr. 1154-1155, 755-756). At this time, Vice-President and General Manager Michael Fink told Plant Superintendent Robert Howland about the organizational activity and asked him to "look into it and report back" (R. 32; Tr. 751, 756, 915-918). Howland, in turn, called a meeting of his leadmen and foremen in late February and instructed them to "keep their eyes and ears open" for union talk and to report information back to him (R. 32; Tr. 1536-1538, 1583, 1592, 1619, 1628, 1611). These foremen and leadmen sought out and obtained information from employees about their union sympathies and reported this to Howland (R. 32; Tr. 1525-1526, 1535, 1554, 1564, 1568-1569, 1586, 1597, 1604-1607, 1624, 1668, 1673).

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[3]The Company offered some testimony that Sloane said the cards would be used solely for an election. The Examiner discredited this version of Sloane's remarks and thus credited Sloane's testimony (R. 24-25, 29).

Howland himself questioned employees about the Union (R. 32; Tr. 527-528, 557-558, 128-129, 1139, 278, 1229-1230, 1428-1429). He approached employee Jackie Virgil, stating that he "heard [that Virgil] had signed a card". Virgil did not reply (Tr. 384-387). On one occasion after a union meeting in mid-March, he questioned employee Anders Ahlstrom about the meeting and asked what the Union had promised him (Tr. 393). Howland also stated that the Union could not get more money for him, that "there would be benefits" and if the union came into the plant he would have to pay dues and it would "cut down the hours" (Tr. 393). Also at this time, Howland asked employee Irving Klein what the Union could do for the Company. After Klein answered, Howland said that the Company could either bargain with the Union, fight the Union or "go out of business" (R. 31; Tr. 275). On another occasion Howland asked employee Thomas Booze what he thought of the Union (Tr. 1430-1431).

Fink also spoke with many employees about the Union (R. 32; Tr. 1394, 886-887, 993-994). In early March, 1965, shortly after the first union meeting, Fink approached employee Al Cantrell and stated, "I understand that there is a Union campaign going on" (R. 31; Tr. 121-122). When Cantrell replied there was, Fink stated, "I would like a little kickback on it . . . . Is there anything you could tell me about the [union] meeting, or about the campaign?" Cantrell told him that the Union wanted to "see if we want to have a Union or be represented by UAW-CIO." (R. 31; Tr. 122). Fink also asked Cantrell to give him the names of other employees who attended the union meeting, but Cantrell refused (R. 31; Tr. 122).

In the course of Howland's conversations about the Union with employees, he questioned them about conditions in the shop (Tr. 1229-

1232). They complained about low wages (Tr. 1231-1232). At the beginning of March, the Company decided to give raises to its employees (Tr. 79-81). At this time Company officials were aware of the union activity at the shop (Tr. 83-84). The Company announced and put into effect raises for some 65 employees in all classifications on March 8, 1965 (R. 24; Tr. 898, 1146-1150, GCX 106, 107).

On March 9, 1965, President Weitzel spoke to assembled employees on work time. He stated that he had heard rumors of union talk and dissatisfaction (R. 25; Tr. 33, 36, 279-280). He explained that there was no need for a union, that organized shops in San Francisco were barely existing and that a union could drive the Company out of business (R. 25; Tr. 37, 280). He also stated that he felt the Company and the employees could solve their problems "among themselves" (R. 25; Tr. 36, 279-280). He then suggested the formation of a grievance committee (R. 25; Tr. 36, 280). Representatives for the committee were selected by the employees and later that day during working time they met with representatives of management (R. 25; Tr. 37-38, 342). A number of topics were discussed at the meeting, including increased insurance coverage, vacations, bonus and holiday pay (R. 26; 40-41, GCX 3). That evening Foreman Walter Payton, an admitted supervisor (Tr. 718), chaired a meeting at which 2 employees were elected to the grievance committee to represent the night-shift employees (R. 25 n. 1; Tr. 338-341). On March 13, President Weitzel wrote letters to all employees advising them that he was looking into a better hospitalization plan as a result of the meeting (GCX 10).

Other Grievance Committee-management meetings were held on March 16, April 5 and May 21, 1965 (R. 26; GCX 3, 4, 5, 7, Tr. 39-47, 342-343).

Minutes of prior meetings were prepared by the Company and read and distributed to employee representatives at the following meeting (Tr. 40-46, 343, 354-355, 819). Discussions continued on insurance coverage and vacation pay as well as other matters such as hours of work, sick and overtime pay, and job classifications (R. 26; Tr. 345, 346, 351-353). At one meeting employee representatives brought up the proposal that the Company repair or replace measuring indicator points which machinists had to provide themselves; the Company agreed to provide and pay for the indicator points in the future (R. 26; Tr. 347-349, 359-360, 1134-1135, 825). On another occasion the Company supplied a larger grinding wheel which the Committee representatives had requested (R. 26; Tr. 350, 1135). On April 7, 1965, the Company distributed to all employees a report signed by President Weitzel, of matters discussed at the April 5 management-Grievance Committee meetings (R. 26; GCX 6, Tr. 45). In the report, the Company stated that it recognized that changes in the group insurance policy "are necessary" but because of "labor law regulation while the labor board proceedings are pending," the Company would not "give any increased benefits." The report continued, "this same problem prevents improved benefits regarding holidays, vacation pay and other items discussed with your representatives," and promised that the Company would continue to have "increased wages and benefits" (R. 26; GCX 6).

The Grievance Committee has no by-laws, rules or constitution. It collected no dues and held no meetings on its own or with other employees; it met with management only on working time. Vice-President Michael Fink selected the time and place of the meetings (R. 32; Tr. 354, 341; Tr. 38, 47-48, 342). Management officials then notified the employee representatives of the time of the next meeting (R. 32; Tr. 48, 342-343, 344).

After the May 21 meeting, which was held some three weeks prior to the election, no further meetings were apparently ever held.

C. The Union is authorized as bargaining representative by a majority of the employees and seeks to obtain recognition. The Company refuses.

Between Sunday February 28, the day of the first union meeting, and Wednesday, March 3, 1965 a majority of the 114 or 115 employees concededly in an appropriate unit (See Co. Br. 9) signed authorization cards (GCX 25, 28-100).[4] By March 12, 1965 the Union had received 68 of these cards (Tr. 700-703). On that day the Union sent a letter to the Company stating that a majority of its production and maintenance employees had selected the Union as their bargaining agent. The Union also offered to prove its majority status by submitting the cards to an impartial third party and stated a desire to begin negotiations towards a collective bargaining agreement (R. 25; Tr. 703-704, GCX 38).

On Sunday, March 14, the Union held a second meeting with employees at the Union Hall. About 45 of the Company's employees attended (Chg. Party Exh. # 2, Tr. 1745). Howard Berno, an employee who was later

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[4]The Authorization cards read, in relevant part, as follows:

MAIL THIS CARD TODAY
AUTHORIZATION TO UAW

Date_____, 19____

I_____ authorize UAW to represent me in collective bargaining
(print name)

[space for address and job information]

_____
signature

The reverse of the card, with postage paid, had the Union's name and the address of its Los Angeles headquarters.

appointed Personnel Manager, a supervisory position, attended this meeting (R. 25; Tr. 333). The next morning, he reported to Vice-President Fink about the meeting and also informed him that Union Representative Sloane told those in attendance that he had sent a letter to the Company (Tr. 1725-1726, 1777-1778).

On March 19, 1965, the Company responded to the Union's request for recognition by letter, stating that it had a "good faith doubt" as to the Union's majority. The letter continued, "We do not believe that our employees have authorized your organization to represent them, freely, voluntarily, and without coercion. We further have no knowledge of the authenticity of any authorization cards that you claim to have, or the circumstances under which they may have been obtained. For these reasons we must decline to recognize you as the bargaining representative of any of our employees" (R. 26-27; GCX 39).

D. The Union files an election petition; the Company unlawfully interferes with the election

On March 22, 1965, the Union filed a petition for an election. (R. 27; GCX 1(a)). A hearing was held and on May 18, 1965, the Regional Director ordered an election to be held in an appropriate unit (R. 27; GCX 1(b)(c)).

In leaflets and letters sent or distributed to individual employees, the Company urged the employees to reject the Union. In one communication the Company stated that a union contract "is no better than the ability of the company to continue to remain in business. Look at what happened to Falco Tool and Die. It had a contract with this Union but where is it now?" (R. 27; GCX 9, Q&A # 25). On May 12, Vice-President Fink elaborated in a letter to all employees, stating:

> If you have not heard or are a newcomer to the trade, Falco, Mars and Alba Engineering were large and successful job shops in the area and some years back their employees were promised the Pie-in-the-Sky and went union. As the story goes, the Pie-in-the-Sky hit the sky blue yonder. Alba Engineering lasted six months; Mars and Falco did not last much longer when they too hit the blue because these shops could no longer operate with the shop stewards or the boys from Detroit. (R. 27; GCX 14, Tr. 56).

The Company also sent other letters to employees. One from its regional sales manager, stated that customers were "concerned about the consequences" should the Union succeed and whether the Company could compete (R. 27; GCX 15). Another letter, solicited by President Weitzel, bore the signature of the former president of Falco Machine and Tool Company. The letter stated that his company was prospering when "a union was introduced into our plant." The letter also praised the Company's management and stated, "the employees of Falco chose a union and found themselves heading down the road to self-destruction." (R. 28; GCX 20).

On June 8, 1965, Fink again wrote to employees. He emphasized that the Company "did not have to give a thing" the Union asked for and that a strike would follow if the Union's demands were rejected. Urging employees to disbelieve Union claims that a strike would not occur, he asserted, "It could happen especially when that union is the UAW. They have called many strikes—some of them long, brutal and bloody." Enclosed with the letter was a copy of a pamphlet, issued in April 1955 by the Kohler Company of Kohler, Wisconsin, portraying in a photograph on its cover Kohler's view of the violent strike which began there in 1954. Inside, the pamphlet lists asserted UAW abuses such as "serv[ing] only the Marxist doctrine" (R. 28; GCX 17a & b).

On June 10, 1965, the day before the election, President Weitzel spoke to employees in the shop by telephone transmitted through a public address system. He appealed to employees to reject the Union. He stated "If we have problems, let's solve them ourselves. That is why we have our shop committee. . . ." He later stated that if the Union won the election, "the very life of this Company—may be—your job—all our jobs—would depend upon our resistance to any economically unsound demand." He ended by saying, "If you vote for the union, you are saying that I don't deserve 'to keep my business.' A vote for the union is a vote against me personally . . ." (R. 28; GCX 19, Tr. 60).

E. The Company discharges Union Leaders Cantrell and Klein

Alfred Cantrell, was a milling machinist on the night shift and an outspoken union advocate (R. 33; Tr. 117, 137, 1178, 1358). He was fired on May 11, 1965, one month before the election (R. 33; Tr. 129). Cantrell had attended union meetings, solicited authorization card signatures, and talked up the Union in the shop (Tr. 118-120). As previously noted, Vice-President Fink had questioned him about one union meeting and at that time Cantrell refused to supply Fink with the names of those who attended (*supra,* p. 5). Later, in early April, Personnel Manager Howard Berno introduced Cantrell to a psychology professor, Howard Schwartz, who was visiting the plant, as the "strongest Union man in the shop" (R. 31; Tr. 124-125). Berno left and Schwartz questioned Cantrell as to why he supported the Union (R. 31; Tr. 126).

On Cantrell's last day of work he was notified by a temporary foreman, Paul Mansfield, that the Company was laying him off. Mansfield could not supply Cantrell with a reason for his selection, but stated that

this "makes me more for the Union" (R. 34; Tr. 129-131). The next day, May 12, Cantrell went to Fink's office. Fink told him he was being laid off because of a shortage of work (R. 34; Tr. 132). Cantrell told Fink about an ad, placed in that day's paper by the Company, seeking a jig-bore machinist. Fink at first denied the Company was looking for a machinist, but was informed by Personnel Manager Berno, who was also present, that there was indeed such an ad. Fink then told Berno to remove the ad (R. 34; Tr. 132-135, GCX 26 and 27). Cantrell was not offered the job nor was he recalled (R. 34; Tr. 139).

Irving Klein, a tool and gauge maker with some 23 years' experience, was fired on June 25, 1965, shortly after the Union filed objections to the election (*infra*, p. 13). Klein was notified by Union Representative Sloane of the industry-wide organizational campaign and he began to solicit union support at the shop beginning in mid-February, 1965 (R. 25; Tr. 270-272). He was active in the union campaign, attended union meetings and solicited authorization cards from employees (R. 25; Tr. 270-273). The Company interrogated him about what the Union could do for the Company and he replied that what was important was what the Union could do for the trade (Tr. 275). Howland twice warned him that the Company could go out of business if the Union won representation (Tr. 275, 278). On another occasion, Howland approached Klein and stated, "Irving, you don't look like an organizer to me". When Klein objected, Howland replied that he did not mean a "paid" organizer, but that he considered all employees campaigning for the union organizers (R. 67; Tr. 276-277, 1113-1114).

On the day of Klein's discharge, Foreman Franz Isak called him into an office and, in the presence of Personnel Manager Howard Berno, told

him that he had been "following [Klein] around", that Klein "was too slow" and he had to "let [Klein] go" (R. 26; Tr. 282). At this time and without explanation Isak handed Klein a profit and loss statement, but before Klein had a chance to study it, Berno took it back (Tr. 282). Isak then handed Klein a discharge slip and his final two checks (Tr. 282).

F. The Union loses the election and files objections

On June 11, 1965, the election was held. Of the 115 eligible voters, 40 voted for the Union and 59 against (R. 27; GCX 1(d)).[5] By telegram on June 17, 1965, the Union filed timely objections to the election (R. 27; GCX 1(p)). On July 6, 1965, the Union filed the first of several charges alleging the Company had committed unfair labor practices and a complaint issued (GCX 1(f)(j)). The Regional Director ordered a hearing to resolve the issues raised by the Union's objections to the election, and that hearing was consolidated with the unfair labor practice hearing (R. 27; GCX 1(e)).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by granting wage increases, interrogating employees and threatening plant closure and loss of jobs if employees selected the Union. It also found that the Company's domination and interference with the Grievance Committee violated Section 8(a)(2) and (1) of the Act

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[5]The Board, in the instant case, upheld the Regional Director's determination of the appropriate unit (R. 29):

> All production and maintenance employees employed by the Employer at its Los Angeles, California plant, including the production liaison employees, inspectors, inspector trainee and draftsmen tool; but excluding all office clerical employees, professional employees, guards, watchmen and supervisors as defined by the Act.

and its discriminatory discharges of employees Cantrell and Klein violated Section 8(a)(3) and (1) of the Act. The Board further found that the Company unlawfully refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act as it represented a majority of the employees in the appropriate unit (R. 67-68, 29-30, 38-39, 32-33).[6]

The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act. Affirmatively, the Board's order requires the Company to disestablish the Grievance Committee; offer full reinstatement with backpay to Cantrell and Klein; upon request, bargain collectively with the Union, and post appropriate notices (R. 39-40, 69).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY GRANTING WAGE INCREASES TO DISCOURAGE UNION SUPPORT; INTERROGATING EMPLOYEES AS TO UNION ACTIVITIES; AND THREATENING EMPLOYEES WITH PLANT CLOSURE AND LOSS OF JOBS IF THEY SELECTED THE UNION

A. The Wage Increases

It is settled law that the granting of economic benefits to discourage support for a union violates Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405. As the Supreme Court there stated, "The danger inherent in well timed increases in benefits is the suggestion of a

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[6]The Board also set aside the election in which the Union was defeated and vacated all proceedings in connection therewith, because of the Company's unlawful conduct which interfered with the free choice of employees (R. 33, 40).

fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." (*Id.* at 409). We submit that the raises awarded here are clearly unlawful under this rule. The Company's granting of wage increases to some 65 employees at the very beginning of the Union campaign was manifestly timed to influence employee choice. In mid-February, 1965, the Company learned of employee support for the Union and dissatisfaction with wages. On March 8, only a week and a half after many employees had attended the first Union meeting and a majority had signed authorization cards, the Company put the raises into effect. At this time, as Vice-President Fink admitted, the Company was fully aware of the Union campaign among its employees (Tr. 83-84). Moreover, the next day, President Weitzel suggested that there was no need for an outside union and urged formation of an unlawfully controlled grievance committee (*infra,* pp. 24-25). In these circumstances, the Board could properly conclude that the Company's action was unlawful. See *N.L.R.B. v. Laars Engineers, Inc.,* 332 F.2d 664, 665-667 (C.A. 9), cert. denied, 379 U.S. 930; *N.L.R.B. v. Douglas & Lomason, Co.,* 333 F.2d 510, 513-514 (C.A. 8); *N.L.R.B. v. Universal Packaging Corp.,* 361 F.2d 384, 387 (C.A. 1); *Betts Baking Co. v. N.L.R.B.,* 380 F.2d 199, 203 (C.A. 10). Contrary to the Company's contention (Br. 90), the coercive impact of such action is not dependent on whether the Union had requested recognition. In *N.L.R.B. v. Laars Engineers, supra,* this Court held that a wage increase was unlawful even though no recognition request had been made and the only union activity was the distribution of literature.

The Company's contention (Br. pp. 90-91) that the wage increases were unrelated to the contemporaneous union activity is without merit. The Company's alleged decision to conduct a wage survey in December, 1964 was not announced anywhere but in the councils of management. Indeed, the decision appears to have been prompted by a realization that the Union was trying to organize the industry in that area (Tr. 753, 1145) since the Company had just given raises 5 months before (Tr. 939, RX 10). Instead, the Company chose to announce and implement the raises at a time of maximum impact. It also expanded the coverage of the proposed raises, which originally applied only to "top rated" employees, to embrace employees in all classifications, some of whom had not been covered in the survey (Tr. 1146-1150, GCX 106). Thus, the Board could properly reject the exculpatory testimony of Company officials. See *N.L.R.B. v. Laars Engineers, supra.*

B. The unlawful questioning of employees

As this Court has recognized, "Interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information [sought]". *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 904. And, "Whether the Company would be disposed to make use of the [information] is beside the point. As long as the opportunity is present, employees may have a real fear that this would be done." *N.L.R.B. v. Essex Wire Corp.*, 245 F.2d 589, 592 (C.A. 9). In accord is the Second Circuit which has recently affirmed that, even where there are no explicit threats, interrogation is unlawful if "the circumstances indicate that coercion is implicit in the questioning" *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 137 (C.A. 2). Relevant circumstances include whether there is

a background of employer hostility and other unlawful activity; whether the employer seeks information to test a claimed majority or seeks to ferret out information most useful for purposes of discrimination, as when employees are asked to identify union supporters; or whether the identity of the questioner, for example a high management official, might create an aura of coercion. *N.L.R.B. v. Milco, supra.* See also *N.L.R.B. v. Luisi Truck Lines,* 384 F.2d 842, 843 (C.A. 9); *N.L.R.B. v. Security Plating Co.,* 356 F.2d 725, 728 (C.A. 9); *Jervis Corp. v. N.L.R.B.,* 387 F.2d 107, 111 (C.A. 6); *Daniel Construction Co. v. N.L.R.B.,* 341 F.2d 805, 812 (C.A. 4), cert. denied 382 U.S. 831; *N.L.R.B. v. Camco, Inc.,* 340 F.2d 803, 804-807 (C.A. 5), cert. denied, 382 U.S. 926; *Joy Silk Mills, Inc. v. N.L.R.B.,* 185 F.2d 732, 742-744 (C.A.D.C.), cert. denied, 341 U.S. 914.[7]

The Board's conclusion that the widespread interrogation engaged in by the Company here (*supra,* pp. 4-5) was coercive and therefore illegal is clearly correct. Particularly relevant is the fact that two high ranking officials, Vice-President Fink and Plant Superintendent Howland, undertook much of the questioning. Fink's request that employee Cantrell supply him with names of those who attended the first Union meeting obviously sought "information most useful for discrimination" *N.L.R.B. v. Milco, supra.* When Howland questioned Klein he mentioned the possibility that the Company could go "out of business" if the Union came in; and he told employee Ahlstrom "there would be benefits" (*supra,* p. 5). In addition,

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[7]The Company's assertion (Br. 83) that Section 8(c) of the Act protects interrogations unless accompanied by threats of reprisal or promises of benefit is contrary to all the authorities and the language of the Act. Interrogation is something more than simply the "expressing of any views, argument or opinion" (*infra* p. 19, n. 10). See, e.g., *Martin Sprocket & Gear Co. v. N.L.R.B.,* 329 F.2d 417, 420 (C.A. 5). The cases cited by the Company do not support its contention; they simply hold that on the facts in those cases the questioning was not coercive.

management officials instructed foremen and leadmen (admitted supervisors (Tr. 718)) to obtain information concerning union sympathies of employees in their department which they later conveyed to Howland. The Examiner concluded (R. 32, 30), in part from his observation of the witnesses, that some of this information was obtained through questioning. For example, Vernon Zeeman, a leadman, testified he reported what he "could get out of" an employee (R. 32; Tr. 1624); and Foreman Walter Payton admittedly asked another employee how he felt about the Union (Tr. 1477). In carrying out their function of making determinations as to the credibility of witnesses, the Examiner and the Board properly rejected testimony that all such information was provided voluntarily (See cases cited *infra,* p. 39).[8]

Furthermore, all of the questioning bore the aura of the Company's known hostility toward the Union, evidenced especially, as the Examiner noted (Br. 32), by the threats that the Company could go out of business because of the Union. President Weizel made this threat in a speech to all employees in which he also suggested formation of a company-dominated committee to combat the Union. It is also significant that the Company had no legitimate reason to question employees about their union activities or sympathies. The Company's interrogations, in the main, were undertaken before receipt of the Union's bargaining demand. Thus, the

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[8] Apart from constituting interrogation, coercive in context, such activity is akin to unlawful surveillance of union activity (cf. *N.L.R.B. v. Collins & Aikman Corp.,* 146 F.2d 454, 455 (C.A. 4)) especially when it is undertaken at the behest of management (see *Daniel Construction Co. v. N.L.R.B.,* 341 F.2d 805, 812 (C.A. 4), cert. denied, 382 U.S. 831). "[I]ntentional eavesdropping [is] likely to deter free discussion by employees of self-organizational matters." *N.L.R.B. v. Clark Bros. Co.,* 163 F.2d 373, 375 (C.A. 2).

interrogation was not in support of a good faith effort to ascertain the validity of union authorization cards. This distinguishes the interrogation in the instant case from the limited questioning, free from coercion, sanctioned by this Court in *Don the Beachcomber v. N.L.R.B.*, 390 F.2d 344, cited by petitioner (Br. 83). See *N.L.R.B. v. Milco, supra.* Nor was the questioning accompanied by statement of a business purpose or assurances against reprisal. The coercive effect was thus "more likely." *N.L.R.B. v. Camco, Inc., supra,* 340 F.2d at 806-807. See also, *N.L.R.B. v. California Compress Co.*, 274 F.2d 104, 106 (C.A. 9); *Blue Flash Express Co.*, 109 NLRB 591; *Struksnes Const. Co.*, 165 NLRB No. 102, 65 LRRM 1385, 1386.[9]

C. Threats

The Board also properly found that the Company's emphasis in speeches and letters to employees on the possibility that it would close its plant and that employees would lose their jobs if they selected the Union exceeded the bounds of free speech and violated the Act.[10] The statute

[9]The Company cannot disavow the conduct of its leadmen and foremen (Br. 83-84) who were instructed by management to seek out information of union support. Clearly, the employees could "reasonably believe that in making [the statements, the foremen and leadmen were] acting for and on behalf of management." *N.L.R.B. v. Geigy Co.*, 211 F.2d 553, 557 (C.A. 9), cert. denied, 348 U.S. 821; *Betts Baking Co. v. N.L.R.B., supra,* 380 F.2d at 202 and cases there cited. This also applies to the questioning of Cantrell by Personnel Manager Berno's professor friend (*supra* p. 11). See *Amalgamated Clothing Workers (Hamburg Shirt Corp.) v. N.L.R.B.*, 371 F.2d 740, 744 (C.A.D.C.); *Colson Corp. v. N.L.R.B.*, 347 F.2d 128, 137 (C.A. 8), cert. denied, 382 U.S. 904. Nor can the Company contend successfully that it should escape liability for the one incident of interrogation it asserts (Br. 84) was conducted in a "friendly and joking atmosphere." See, *A.P. Green Fire Brick Co. v. N.L.R.B.*, 326 F.2d 910, 914 (C.A. 8); *N.L.R.B. v. Marval Poultry Co.*, 292 F.2d 454 (C.A. 4).

[10]Section 8(c) of the Act provides that "the expressing of any views, argument or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

prohibits implied or direct suggestions that in reprisal for unionization the employer will make economic decisions adversely affecting employment, thereby "making anticipated events the subject of threats . . . to force abandonment of the Union by the employees". *N.L.R.B. v. Parma Water Lifter Co.*, 211 F.2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829. Accord: *N.L.R.B. v. Plant City Steel,* 331 F.2d 511, 513 (C.A. 5). "It is well settled that an employer's 'prediction' of untoward economic events may constitute an illegal threat if the employer has it within his power to make the prediction come true." *International Union of Electrical Workers, etc. v. N.L.R.B.*, 289 F.2d 757, 763 (C.A.D.C.). Accord: *N.L.R.B. v. TRW Semiconductors, Inc.*, 385 F.2d 753, 758 (C.A. 9). Plant closures are uniquely within the power of management and hence employer threats that such action will follow unionization are unlawful. *N.L.R.B. v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n. 20. Thus, in order to be protected, "[T]he employer's prediction must be in terms of demonstrable 'economic consequences,' *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 761 (6th Cir. 1965)." *N.L.R.B. v. Sinclair Co.*, 68 LRRM 2720, 2721-2723 (C.A. 1, decided July 3, 1968). See also *N.L.R.B. v. Kolmar Laboratories, Inc.*, 387 F.2d 833, 837 (C.A. 7).

In his March 9 speech, President Weizel stated that organized shops elsewhere were barely surviving and that the Company "could" go out of business because of the Union. The statement was coupled with the suggestion that the Company could solve its own problems through a company-dominated grievance committee. It is plain that Section 8(c) does not insulate Weizel's speech. It obviously amounted to more than a general prediction of economic consequences beyond the Company's power to control. Weizel cited no competitive reasons for the probable

shutdown; nor did he suggest that the Union would strike or impose any unreasonable demands if it succeeded in obtaining bargaining rights. Furthermore, he made it plain that the employees could expect benefits from the Company through the grievance committee and not through the Union. Here, as in *N.L.R.B. v. Realist,* 328 F.2d 840, 843 (C.A. 7), cert. denied, 377 U.S. 994, Weizel's statement that the Union could shut down the Company constituted a "veiled or implied threat to [shut down] . . . if the union prevailed" and the reference to the unlawful grievance committee "conveyed the idea that . . . the company would afford benefits equally as good if not better to its employees if there were no union." See also, *N.L.R.B. v. Geigy Co.,* 211 F.2d 533, 557 (C.A. 9), cert. denied, 348 U.S. 821; *N.L.R.B. v. V. C. Britton Co.,* 352 F.2d 797, 798-799 (C.A. 9); *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 728; *N.L.R.B. v. Parma Water Lifter, supra,* 211 F.2d at 262; *Surprenant Mfg. Co. v. N.L.R.B., supra,* 341 F.2d at 760-761.

Also coercive was the repeated theme in the Company's election campaign that three named tool and die shops in the area—Mars, Alba and Falco—had closed because the Union won representation there. These assertions did not involve predictions of any sort. The Company simply characterized past events as fact. The implication, however, was plain that the Company would shut down just as its competitors had if the employees selected the Union. Unsupported statements to employees that other plants have closed because of union representation are unlawful veiled threats that the Company will do likewise. *N.L.R.B. v. Realist, Inc., supra,* 328 F.2d at 843; *Surprenant Mfg. Co. v. N.L.R.B., supra,* 341 F.2d at 761; *Gotham Shoe Mfg. Co.,* 149 NLRB 862, 869-870, enforced, 359 F.2d 864, 865 (C.A. 2). Here, as the Examiner found (R.

30), the Company had no factual or legal basis for making such statements. Vice-President Fink, who was responsible for the statements, admitted he had no knowledge of why the three area plants had closed (R. 30; Tr. 890, 892).[11] In these circumstances, the Company is not entitled to the protection of Section 8(c). In determining whether a statement amounts to an implied threat or a protected prediction of events outside the Company's control, the Board may properly consider whether "the utterer had some reasonable basis for it." *International Union of Electrical Workers v. N.L.R.B., supra,* 289 F.2d at 762-763. Accord: *N.L.R.B. v. Miller,* 341 F.2d 870, 872-873 (C.A. 2); *N.L.R.B. v. Joseph Antell, Inc.,* 358 F.2d 880, 881 n. 1 (C.A. 1); and see, *N.L.R.B. v. Harrah's Club,* 362 F.2d 425 (C.A. 9), cert. denied, 386 U.S. 915, enforcing 150 NLRB 1702, 1717-1720.

Nor can the Company's other statements, raising as issues in the Union campaign its ability to stay in business, the possibility of losing customers and job security (Br. 87, *supra* pp. 9-11) be viewed in a vacuum. As the Seventh Circuit has stated (*N.L.R.B. v. Kropp Forge Co.,* 178 F.2d 822, 828-829, cert. denied, 340 U.S. 810):

> In determining whether such statements and expressions constitute, or are evidence of unfair labor practice, they must be considered in connection with the positions of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties. If, when so considered, such statements form a

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[11] Fink later testified to hearsay statements from former employees of two of the companies "quite some time ago" that the companies closed because of the Union (Tr. 990-993). Nor did the Company call any witness to substantiate the claim made in a letter to employees—solicited by the Company and purportedly sent by the former president of Falco—that Falco had closed because of the Union (R. 30).

> part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by section 7, such statements must still be considered as a basis for a finding of an unfair labor practice.

As shown above, Company based a good deal of its anti-union campaign upon unsupported or unexplained facts as to union-caused shutdowns elsewhere. Moreover, in view of the Company's other coercive conduct, the employees could readily discern the Company's ability and intent to carry out its "predictions." In these circumstances the Board could properly discount subtle attempts to shift responsibility for inherently management-controlled consequences to unreasonable union demands or union-caused strikes and inefficiency, and conclude that they constituted unlawful threats of economic reprisal. See, *Surprenant Mfg. Co. v. N.L.R.B., supra,* 341 F.2d at 761; *N.L.R.B. v. Louisiana Mfg. Co.,* 374 F.2d 696, 702-703 (C.A. 8); *N.L.R.B. v. Kolmar Laboratories, supra,* 387 F.2d at 836-838; *N.L.R.B. v. Sinclair Co., supra,* 68 LRRM at 2722; *Wausau Steel Corp. v. N.L.R.B.,* 377 F.2d 369, 371 (C.A. 7); *Corrie Corp. of Charleston v. N.L.R.B.,* 375 F.2d 149, 153 (C.A. 4); *Irving Air Chute Co. v. N.L.R.B.,* 350 F.2d 176, 180 (C.A. 2).

Cases cited by the Company (Br. 87-88) such as *N.L.R.B. v. TRW Semiconductors, Inc., supra,* 385 F.2d 753 and *N.L.R.B. v. Golub Corp.,* 388 F.2d 921 (C.A. 2), where there were no other violations of the Act found, are manifestly not in point. Here it was reasonable for the Board to consider the Company's statements of loss of jobs and plant shutdown in the context of its other unlawful activity, as well as the circumstances surrounding the statements themselves. The line between lawful speech and unlawful threats may be close, but "one who engages in brinksman-

ship may easily overstep and tumble into the brink." *Wausau Steel Corp. v. N.L.R.B., supra,* 377 F.2d at 372.

II.

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DOMINATED AND INTERFERED WITH THE EMPLOYEE GRIEVANCE COMMITTEE IN VIOLATION OF SECTION 8(a)(2) AND (1) OF THE ACT

We submit that the evidence amply shows that the Company dominated and interfered with the formation and administration of the employee Grievance Committee in violation of Section 8(a)(2) and (1) of the Act.[12] Far from being *de minimis,* as the Company asserts in its brief (Br. 93), the overwhelming evidence of Company interference and domination herein shows a callous disregard of employee rights and of the "unhampered freedom of choice which the Act contemplates" *I.A.M. v. N.L.R.B.,* 311 U.S. 72, 80. Indeed, the Company's grip on employees through the Grievance Committee remained intact and had its obvious intended effect throughout the critical period of the Union's demand, the Company's refusal to bargain and the election campaign.

Although, as the Company concedes, there was indeed a "closeness in time" (Br. 93) between the formation of the Committee and election, the evidence shows much more. As shown above (*supra,* pp. 6-7) the Committee became active and began functioning immediately after the Company suggested it and employee representatives were elected the same

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[12] Section 8(a)(2) makes it an unfair labor practice for an employer:

> to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay; . . .

day. The night supervisor presided over the selection of some employee representatives. Management decided when meetings would be held and notified the employee representatives. The meetings were held on Company property, employees were paid for attending, and management took minutes of the meetings and distributed them. The Committee never met independently outside the presence of management and it had no constitution or by laws; nor did it collect dues. This evidence fully supports the Board's finding of a violation. See, *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 213-214; *American President Lines, Ltd. v. N.L.R.B.*, 340 F.2d 490 (C.A. 9); *N.L.R.B. v. H & H Plastics Mfg. Co.*, 389 F.2d 678, 680-681 (C.A. 6); *N.L.R.B. v. Buitoni Foods Corp.*, 298 F.2d 169, 173 (C.A. 3); *N.L.R.B. v. Standard Coil Products*, 224 F.2d 465 (C.A. 1), cert. denied, 350 U.S. 902; *N.L.R.B. v. Philamon Laboratories*, 298 F.2d 176, 181 (C.A. 2), cert. denied, 370 U.S. 919. Furthermore, at the meetings, employees were invited to suggest changes in terms and conditions of employment. Management officials discussed these proposals, promised improvements and in some cases made appropriate changes. The Company also made a point of notifying the employees of all items discussed at the meetings and told them that changes would be forthcoming. Thus, it can hardly be denied that the Company was "dealing with" the Committee as a labor organization within the meaning of the Act. *N.L.R.B. v. Cabot Carbon Co., supra*, 360 U.S. at 214.[13]

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[13]The Company erroneously asserts (Br. 92) that it is "undisputed" that a committee "similar" to the grievance committee existed prior to the onset of the Union. In support of this assertion the Company cites testimony of Vice-President Fink obviously referring to the safety committee, whose aims were unrelated to the grievance committee. Fink later testified that he could not recall "any kind of committee" such as the grievance committee being in existence in the past (Tr. 884).

III.

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY DISCHARGING EMPLOYEES ALFRED CANTRELL AND IRVING KLEIN FOR THEIR UNION ACTIVITIES

As shown in the Counterstatement (*supra,* pp. 11-13), the Company discharged two of the leading union advocates, employees Al Cantrell and Irving Klein. The Board found that these employees were discharged for their union activities. The Company contended that they were terminated for cause. But this "self serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances * * *" *Shattuck Denn Mining Corp. v. N.L.R.B.,* 362 F.2d 466, 471 (C.A. 9). The question is one of fact and, if supported by substantial evidence, the Board's finding must stand even if the reviewing court would have decided the case differently *de novo. Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 488; *Shattuck Denn Mining Corp. v. N.L.R.B., supra; Aeronca Mfg. Co. v. N.L.R.B.,* 385 F.2d 724, 727 (C.A. 9).

Cantrell

The Company discharged Al Cantrell who was identified as "the strongest Union man in the shop" (*supra,* p. 11) at the height of the election campaign. Supervisor Walter Payton called Cantrell a very "outspoken" union advocate (Tr. 167) and had reported him to Howland (Tr. 1198). Fink interrogated Cantrell about his union activities, trying to get Cantrell to supply him with names of employees who attended a recent union meeting (*supra,* p. 5). The Company contends that Cantrell was laid-off —not discharged—because of a reduction in his type of work (Br. 94). But Cantrell was never recalled from layoff status and, as a practical matter,

he was fired, abruptly and without notice or warning. In view of these circumstances and the Company's manifest anti-union hostility, the Board could well conclude that the Company discharged Cantrell for his union activities. See *Aeronca Mfg. Co., supra,* 385 F.2d at 728; *Shattuck Denn Mining Corp. v. N.L.R.B., supra,* 362 F.2d at 471; *N.L.R.B. v. Melrose Processing Co.,* 351 F.2d 693, 699-700 (C.A. 8).[14]

The Company's explanation for Cantrell's termination "fails to withstand scrutiny" and further supports the inference of discrimination. *N.L.R.B. v. Dant & Russell,* 207 F.2d 165, 167 (C.A. 9). As the Board found (R. 68), the evidence refutes any suggestion that there was a decrease in work at the time of Cantrell's discharge. He was working a 54 hour week and most of the employees were working substantial overtime even after the discharge (R. 68; Tr. 1198-1200, 133, 138, 1697-1698, 145-146). The Company apparently recognizes this anomaly and counters that it needed jig-bore machinists and Cantrell did not fit the bill (Br. 94). But the Company offered a jig-bore job to Cantrell in January, 1965, before the start of union activity in the shop, because he was a good machinist; at that time, Cantrell declined the job because he preferred to remain where he was (R. 68; Tr. 136, 177, 1182). When he was laid off, ostensibly for lack of work, the Company was running a newspaper ad for a jig bore machinist (R. 68; Tr. 132-135). The ad made no reference to experi-

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[14] Of course, it is no defense to a charge of discrimination, as the Company contends (Br. 94-95), that it did not fire all the union adherents or that it discharged others who were non-union. See *N.L.R.B. v. Shedd-Brown Mfg. Co.,* 213 F.2d 163, 174-175 (C.A. 7); *Nachman Corp. v. N.L.R.B.,* 337 F.2d 421, 424 (C.A. 7). It is significant, however, that employee Victor Stone, who was laid off at the same time as Cantrell (Br. 95) was, unlike Cantrell, recalled or rehired in July 1965 (Tr. 1315-1317). Stone had not signed a Union card (see Company Brief, p. 10) and there is no evidence in the record that he was in any way active on behalf of the Union.

ence being required (GCX 26, 27). Nevertheless, the Company did not offer the open spot to Cantrell even though he testified without contradiction that he told Fink that he had jig-bore experience and wanted the job (Tr. 139, 174-175).[15] The Company's suggestion (Br. 95-96) that its failure to offer him the job could have been due to the fact that he turned it down earlier misses the mark. In January, Cantrell was permitted to turn down the job, which offered him no immediate increase in pay (Tr. 143) and still remain employed; but in June he was terminated without even being offered the open spot. The significant intervening factor was, of course, Cantrell's union activity.

Klein

The evidence also amply supports the Board's finding that the Company discriminatorily discharged Irving Klein. He had initiated the union campaign among Company employees in mid-February, 1965 (Tr. 270). When he was notified by Union Representative Sloan of the industry-wide organizational campaign, Klein began to solicit union support at the shop; he attended union meetings, solicited authorization cards and was "very active" in the election campaign (Tr. 270-271). The Company knew of his activities. Both Howland and Klein testified that, in one conversation between them, Howland told Klein that he did not look like a "paid" or "professional" organizer (*supra,* p. 12). The Board could properly give this conversation its plain meaning (R. 67) despite the Company's suggestion that Howland could have been "jesting" (Br. 97). Indeed, Howland thought enough of Klein's pro-union influence on employees that he

[15] Nor was Cantrell offered any other job although the Company had other work. In addition to the continued use of overtime, the Company had a standing offer of a $50 bonus to employees who recruited skilled machinists (R. 68; Tr. 177, 1197). It seems unlikely, under ordinary circumstances, that the Company would have permanently released a skilled machinist like Cantrell, who was hired as a general machinist and could operate several different types of machines (Tr. 137, 140-143).

approached or interrogated him about the Union on at least two other occasions (*supra*, p. 12).

Klein was discharged shortly after the election and after the Union had filed objections to overturn it. His discharge at this time assured the Company of not having to contend with him in a second election campaign and made abundantly clear the Company's refusal to tolerate union activity among remaining pro-union employees. The discharge thus "discourage[d] membership in any labor organization." Section 8(a)(3). In view of the Company's pervasive unfair labor practices, the possibility of a second election was in no way remote, as suggested by the Company in its brief (Br. 96). The Board is not required to close its eyes to the effects of discriminatory employer action subsequent to a union's election defeat. See, *N.L.R.B. v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 693 (C.A. 8).[16]

The Company's claim that Klein was discharged for poor production does not "ring true" (*Burk Bros. v. N.L.R.B.*, 117 F.2d 686, 687 (C.A. 3), cert. denied 313 U.S. 588); see *Shattuck Denn Mining Corp. v. N.L.R.B.*, *supra*, 362 F.2d at 471. Just three months before, it gave him a 15¢ raise and Howland told him he was a "top man" (R. 35; Tr. 294). Thereafter Howland told Klein, a veteran toolmaker with twenty-three years of experience, not to worry about certain so-called profit and loss statements, which the Company now contends form the basis for Klein's discharge (Br. 98). Howland also told Klein that "the way the company delegates jobs,

[16] In that case, the employer announced wage increases subsequent to an election in which the Union had been defeated but before objections had been filed; and it granted the increases while the objections were pending. The Eighth Circuit found this conduct unlawful because it created the impression that further benefits would be forthcoming "if there were a continued rejection of unionization." 379 F.2d at 692.

they either make or break a man by giving him a job that was close or not close–timewise . . . " (R. 36-37; Tr. 295-297).[17] Howland's assurances to Klein show that the Company put little stock in the profit and loss statements, at least as they applied to the type of jobs "delegated" to Klein. Howland was apparently more concerned with the quality of the work of an experienced toolmaker like Klein than with his speed. The evidence is clear that Klein was never criticized about the quality of his work (R. 37; Tr. 318-319, 297-298). Moreover, the Company did not rebuke or discharge Klein in December 1964 when, as the Company states in its brief, "the majority of his jobs were losses" (Br. 98). Obviously, Klein "became intolerable" only after the onset of the Union on whose behalf he actively campaigned. See, *N.L.R.B. v. Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 366 (C.A. 6).

IV.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN COLLECTIVELY WITH THE UNION

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." That section provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive

[17]The Board found that the statements do not accurately measure production. According to the Company's sytem, each job assigned to a tool maker like Klein is estimated in terms of hours and costs. Other employees may work on the job for special cutting or boring operations, but the tool maker who is assigned the job is charged with all time spent in completing the project. The difference between the estimated and actual cost represents profit or loss. As the Examiner found, the statements do not account for low estimates or delays by workers other than the tool maker assigned the job. (R. 36; Tr. 1130, 1189-1191, 1256-1259, 1264, 1284, 287-293, 322). Thus,

representatives of all the employees in such unit * * * ." Although under Section 9(c)(1) the Board conducts elections to determine representative status, it has long been settled that such status may be shown by other means. See, *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72. Thus, when a majority of employees in an appropriate unit sign union authorization cards, an employer violates Section 8(a)(5) if he refuses to recognize or bargain with the union and such refusal is not motivated by a good faith doubt of the union's majority. *N.L.R.B. v. Luisi Truck Lines, supra*, 384 F.2d at 846-847 (C.A. 9); *N.L.R.B. v. Security Plating Co.*, 356 F.2d 725, 726-727 (C.A. 9); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 908-909 (C.A. 9), cert. denied, 379 U.S. 961; *Snow v. N.L.R.B.*, 308 F.2d 687, 691, 694 (C.A. 9); *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 209-210 (C.A. 9); *N.L.R.B. v. Atco Surgical Supports, Inc.*, ___ F.2d ___, 68 LRRM 2200, 2201 (C.A. 6, decided May 10, 1968); *N.L.R.B. v. Goodyear Tire & Rubber Co.*, ___ F.2d ___, 68 LRRM 2137, 2137-2138 (C.A. 5, decided May 6, 1968).

In such circumstances a bargaining order is the appropriate remedy. As the Fifth Circuit recently stated (*N.L.R.B. v. Goodyear Tire & Rubber Co., supra*):

> [S]uch an order is clearly within the Board's discretion, especially when the employer has engaged in unfair labor practices such as is the case here. [Citations omitted.] It is equally so where the employer takes the bold course of refusing to bargain as the means of testing representation of a majority. Even more so is it when this intransigence flows from an inflexible company policy of ignoring authorization cards and insisting on a Board election as the price for bargaining. Of course the

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the fact that several days before Klein's discharge Foreman Isak told him that he was not planning his jobs properly is of no particular consequence. Isak accepted Klein's answer that he could not be responsible for the hours used by other employees (R. 26; Tr. 281-282).

> fact that the Union's majority may have been dissipated during the pendency of the present action affords no defense to the employer. Such reasoning would allow the employer to profit by his own wrongdoing and would encourage, not discourage, the very activities which the law so plainly forbids.

Accord: *N.L.R.B. v. Gordon Mfg. Co.*, ___ F.2d ___, 68 LRRM 2457, 2458 (C.A. 6, decided, June 6, 1968). These principles also apply where the union, after its card majority is rejected by an employer, chooses to go to an election which is invalidated because of employer misconduct. *Bernel Foam Products, Inc.*, 146 NLRB 1277; *Master Transmission Rebuilding Corp. v. N.L.R.B.*, 373 F.2d 402 (C.A. 9); *N.L.R.B. v. Luisi Truck Lines, supra*, 384 F.2d at 845, 847; *N.L.R.B. v. Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 853 (C.A. 1); *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2); *N.L.R.B. v. Frank C. Varney Co.*, 359 F.2d 774, 775-776 (C.A. 3). As these cases illustrate, where an election has been rendered an imprecise indicator of employee choice because of an employer's misconduct, the Board may properly determine union support by the only means possible at or near the time of the bargaining demand and provide a remedy for the employer's misconduct.

We show below that a majority of the employees had selected the Union; that the Company's refusal to bargain was not motivated by a good faith doubt of majority status; and that, in the circumstances of this case, the Board properly ordered the Company to bargain with the Union.

A. The Union represented a majority of the employees

The Union's majority status as of March 12, 1965, when it requested recognition, is established by authorization cards signed by 68 of the 114 or 115 employees in the concededly appropriate unit (*supra*, p. 8). In responding to the Union's demand the Company stated that it had "no

knowledge of the authenticity of any authorization cards that you claim to have or the circumstances under which they may have been obtained" (*supra*, p. 9). However, at the hearing, the Company challenged the Union's majority on the grounds that three of the cards were not properly authenticated and, secondly, that some employees were induced to sign their cards by misrepresentations of their purpose attributable to Union solicitation. Both of these attacks, we submit, were properly rejected by the Board.

1. The authenticity of the cards of Anathaiwongs, Doebler, and Meier

Initially, the Company objects to the introduction into evidence of the cards of employees Anathaiwongs, Doebler, and Meier (Br. 11). These employees were unavailable at the time of the hearing (Tr. 1739-1740). Their cards were authenticated, as were others, by a handwriting expert. In addition, the authenticity of these cards was established by the undisputed testimony of other witnesses. It is settled law that authorization cards may be authenticated by such means. *N.L.R.B. v. Howell Chevrolet Co.*, 204 F.2d 79, 85-86 (C.A. 9), aff'd on other grounds, 346 U.S. 482; *N.L.R.B. v. Howard Cooper Corp.*, 259 F.2d 558, 560 (C.A. 9); *N.L.R.B. v. Sunshine Mining Co.*, 110 F.2d 780, 790 (C.A. 9), cert. denied, 312 U.S. 678; *Colson Corp. v. N.L.R.B.*, 347 F.2d 128, 134 (C.A. 8), cert. denied, 382 U.S. 904.

The handwriting expert testified that the signature and date on the card of Anathaiwongs corresponded with the signature on his cancelled checks and insurance data (Tr. 191-192, 193-194), although the expert had no opinion as to whether it also corresponded with the writing on Anathaiwongs' W-4 form (Tr. 250). However, employee Homnan testified that Anathaiwongs gave him a card, explained its purpose and filled it out

for him; he further testified that Anathaiwongs filled out his own card in Homnan's presence (Tr. 491-492), and told him that he would send both cards to the Union (Tr. 499). The handwriting expert was unable to authenticate Doebler's card because he did not have adequate samples with which to compare it (Tr. 204-205). But employee Irving Klein testified that he gave Doebler a card in early March (Tr. 305) and "noticed the card was filled out and completely signed" when it was returned to him (Tr. 307). The card is dated March 2, 1965 (GCX 55). Finally, it is undisputed that Meier, whom the Company knew to be "for" the Union at the time of the demand (RX 7), signed his card. Although the Company questions the date (Br. 12, n. 6), the card bears the date of February 28, the day of the first union meeting at which many employees signed cards (GCX 76). In contrast, "[T]here is nothing in the record to indicate there was any irregularity in connection with . . . [these cards]" *N.L.R.B. v. Luisi Truck Lines, supra,* 384 F.2d at 846, n. 3. Accordingly, they were properly received and counted by the Board.[18]

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[18] The Company also claims (Br. 13) that it should have been permitted to impeach the qualifications of the General Counsel's handwriting expert by cross-examining him as to the authenticity of other signatures unrelated to his direct testimony. But the Company conceded the expertness of the witness at the hearing (Tr. 257). Company counsel thoroughly cross-examined the witness and even introduced the testimony of another handwriting expert for impeachment purposes. In these circumstances, the Trial Examiner could properly limit the scope of the cross-examination. The discretion of the Examiner in this respect is not to be disturbed absent a "strong showing" of prejudice. *N.L.R.B. v. Phaostrom Instrument & Electronic Co.,* 344 F.2d 855, 857-858 (C.A. 9). In any event, even assuming that the Examiner's ruling was erroneous, the Company has not shown prejudicial error, since, as we have shown above, the authenticity of the three cards contested by the Company was established by other testimony. Furthermore, the Company did not come forward with any evidence which disputed such testimony.

2. The validity of the cards

The cards herein unambiguously state in bold letters, "Authorization to UAW," and further state that the signer "authorizes the Union to represent [him] in collective bargaining" (*supra,* p. 8, n. 4). Although the cards themselves make no mention of an election, the Company alleges that statements made to employees concerning a possible election negated the clear purpose stated on the cards and therefore warranted rejection of the card. However, it is clear that a card may be used for more than one purpose, such as, for example, to obtain a Board election. Section 9(c)(1)(A) of the Act provides that the Board will investigate an election petition filed by a union when it alleges that a "substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative. . . ." The Board has concluded that it will conduct an election on a union's petition only if it "has been designated by at least 30 percent of the employees." Statements of Procedure of NLRB, Series 8, as amended, Section 101.18(a). Therefore, it is proper for a Union to state that a card may be used to obtain an election, for that is a correct statement of the law. As the Sixth Circuit has said, "[T]he signing of authorization cards [is] an essential preliminary to a union petition for an election"; and representations to that effect are truthful where the Union "did indeed seek an election." *N.L.R.B. v. Cumberland Shoe Corp.,* 351 F.2d 917, 920; *United Automobile Workers (Preston Products Co) v. N.L.R.B.,* 392 F.2d 801, 807, n. 1 (C.A. D.C.), cert. denied, 68 LRRM 2408 (June 10, 1968). See also, *Atlas Engine Works, Inc. v. N.L.R.B.,* 68 LRRM 2635, 2636 (C.A. 6, decided June 28, 1968).[19]

[19]There is no inconsistency in the fact that a union seeks a Board election on the basis of cards, notwithstanding it already has a majority and the employer, as here, has refused to bargain with it. See, e.g., *N.L.R.B. v. Security Plating Co.,* 356 F.2d 725,

In order to invalidate a clear and unambiguous authorization card, it must be shown that the card was signed because of misrepresentations, attributable to the union, that the only purpose of the card was for an election, i.e., where the representations contradict the clear language of the cards. *United Automobile Workers (Preston Products Co.) v. N.L.R.B., supra,* 392 F.2d at 807 (C.A. D.C.); *Amalgamated Clothing Workers of America (Hamburg Shirt Corp.) v. N.L.R.B.,* 371 F.2d 740, 745 (C.A. D.C.); *N.L.R.B. v. Southbridge Sheet Metal Works, Inc., supra,* 380 F.2d 851 at 855-856; *Furr's, Inc. v. N.L.R.B.,* 381 F.2d 562, 567-568 (C.A. 10), cert. denied, 389 U.S. 840; *Englewood Lumber Co.,* 130 NLRB 394, 395. See also, *Bryant Chucking Grinder Co. v. N.L.R.B.,* 389 F.2d 565, 568 (C.A. 2), cert. denied, 68 LRRM 2408 (June 10, 1968); *N.L.R.B. v. Swan Super Cleaners, Inc.,* 384 F.2d 609, 618 (C.A. 6); and *N.L.R.B. v. Dan Howard Mfg. Co.,* 390 F.2d 304, 309 (C.A. 7).[20]

Moreover, the employer bears the burden of establishing by clear and convincing evidence the existence of misrepresentations which would vitiate unambiguous cards. "A morass of hazy individual recollections of attendant circumstances will not suffice" *Amalgamated Clothing Workers*

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727 (C.A. 9); *Irving Air Chute Co. v. N.L.R.B.,* 350 F.2d 176, 182 (C.A. 2). The election route is less costly and time consuming than an unfair labor practice proceeding. Moreover, a union, certified after a Board election, enjoys special benefits not available to unions recognized by other means such as protection of its representative status for 1 year (see *Ray Brooks v. N.L.R.B.,* 348 U.S. 96) and protection from raids from rival unions (see Section 8(b)(4)(C) and 8(b)(7) of the Act).

[20]Contrary to the thrust of the Company's brief on this point (Br. 19-35), the courts have, on the whole, accepted the Board's view as to what amounts to misrepresentation. In *Cumberland Shoe Corp.,* 144 NLRB 1268, enforced, 351 F.2d 917 (C.A. 6), the Board held that clear cards would be vitiated only if the solicitor indicated to the signer that the card would be used *only* for an election. As shown above, the District of Columbia, First, and Tenth Circuits have accepted the rule. Three other circuits—the Second, Sixth, and Seventh—have also approved the rule, but, in subsequent

(Hamburg Shirt Corp.) v. N.L.R.B., supra, 371 F.2d at 745; *N.L.R.B. v. Southbridge Sheet Metal Works, Inc., supra,* 380 F.2d at 855; *N.L.R.B. v. Glasgow Co.,* 356 F.2d 476, 478 (C.A. 7); *N.L.R.B. v. Gordon Mfg. Co., supra,* 68 LRRM at 2458 ("positive" misrepresentation needed); and see, *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 726-727; *N.L.R.B. v. Geigy Co., supra,* 211 F.2d at 556; *Matthews & Co. v. N.L.R.B.,* 354 F.2d 432, 436-438 (C.A. 8), cert. denied, 384 U.S. 1002; *Furr's, Inc. v.*

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cases, have rejected reliance upon use of the words "sole" or "only" for an election. These circuits hold that misrepresentation is shown by "words . . . clearly calculated to create in the minds of the one solicited a belief that the only purpose of the card is to obtain an election." *N.L.R.B. v. Swan Super Cleaners, Inc., supra;* see *N.L.R.B. v. Dan Howard Mfg. Co., supra; Bryant Chucking Grinder Co. v. N.L.R.B., supra;* (compare opinion of Judge Hays with that of Judge Friendly discussing his opinion in *N.L.R.B. v. Nichols,* 380 F.2d 438 (C.A. 2), relied on by the Company (Br. 21)). See also, *N.L.R.B. v. Consolidated Rendering Co.,* 386 F.2d 699, 703 (C.A. 2). The Board has recently affirmed its *Cumberland Shoe* rule while making clear that the rule was never intended to be a mechanical one. "It is not the use or non use of certain key or "magic" words that is controlling, but whether or not the totality of the circumstances . . . is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election." *Levi Strauss & Co.,* 172 NLRB No. 57, 68 LRRM 1338, 1341-1342; see also *McEwen Mfg. Co.,* 172 NLRB No. 99, 68 LRRM 1343, 1349-1351.

The Company also relies on cases from the Fourth and Fifth Circuits which have apparently rejected the *Cumberland* rule. See, *Engineers & Fabricators, Inc. v. N.L.R.B.,* 376 F.2d 482, 486-487 (C.A. 5); and *Crawford Mfg. Co. v. N.L.R.B.,* 386 F.2d 367 (C.A. 4), cert. denied, 390 U.S. 1028. But these cases do not hold that the mere mention of an election vitiates clear cards. In *Crawford,* as the court stated (*id.* at 371), the "findings of the examiner . . . make an issue of whether . . . the cards were signed solely to procure an election." Indeed, the Fifth Circuit has recently stated that its position "does not seem to differ from" *N.L.R.B. v. Swan Super Cleaners, supra. N.L.R.B. v. Lake Butler Apparel Co.,* 392 F.2d 76, 82. See also, *N.L.R.B. v. Phil-Modes, Inc.,* __ F.2d __, 68 LRRM 2380, 2381 (C.A. 5). As for the denial of certiorari in *Crawford,* emphasized by the Company (Br. 29), we point out that the Supreme Court has recently denied certiorari in *Bryant Chucking Grinder* and *Preston Products* also.

This circuit has no cases directly on point, although one such case which presents the issue is now pending before the Court (*N.L.R.B. v. South Bay Daily Breeze,* No. 21,949).

N.L.R.B., supra; Bryant Chucking Grinder Co. v. N.L.R.B., supra. Of course, the Company must show not only the existence of a misrepresentation but also responsibility of the Union and reliance upon such misrepresentation by the employee.[21]

The Company's contention that the authorization cards herein were signed because of misrepresentations by the Union is completely at odds with the record. The evidence relied on by the Company—union-distributed circulars; discredited testimony concerning Union representative Sloane's remarks at a union meeting; and other testimony, some discredited, as to individual solicitation of employees—falls far short of meeting its burden of proof on this issue. In short, there is no clear showing by competent evidence that employees signed cards in reliance upon Union representations, contradicting the plain authorization language of the cards, that the only purpose of the cards was for an election.

At the outset, the Company has not shown that the card signers relied on statements in the union circulars when they signed their authorizations. Such reliance is a necessary element of the Company's proof. See *Bryant Chucking Grinder Co. v. N.L.R.B., supra,* 389 F.2d at 571 (concurring opinion of Judge Friendly). Nearly all of the employees here had signed their cards *before* the issuance of the circulars, which were dated, as the Company states (Br. 37, 38), on March 3, 10, and 14; the circulars

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[21] The Company seems to suggest that the General Counsel has the burden of proof on this issue (Br. 30). But the case it cites to support its contention, *N.L.R.B. v. Lake Butler Apparel Co., supra,* 392 F.2d at 81-82, shows only that once the party attacking the cards makes a prima facie showing of misrepresentation, the burden of persuasion shifts to the General Counsel. We read *Crawford v. N.L.R.B., supra,* 386 F.2d 367 (C.A. 4) in the same manner. See also, concurring opinion of Judge Friendly in *Bryant Chucking Grinder Co. v. N.L.R.B., supra,* 389 F.2d at 570-571.

could not have influenced employees who had already signed cards. In any event, the circulars properly stated the Union's approach in organizing industry-wide and they referred to the signing of *authorization* cards. The Union's "intention to petition [for election] for each shop at the point where a substantial majority of the shop employees have signed and mailed in their Authorization Cards" (RX 4) does not contradict the meaning of signed cards clearly authorizing the Union to bargain and it correctly represents the law. Moreover, here the Union did in fact petition for an election seeking certification when the Company rejected its card majority. (See discussion and authorities cited *supra*, pp. 35-36, and n. 19).[22]

The Company also attempts (Br. 40-46) to overturn the Trial Examiner and the Board's resolution of conflicting testimony. They credited the testimony of Union representative Sloane as to his remarks at a union meeting on February 28, 1965 (R. 24-25, 29). The Company thus undertakes a heavy burden, since credibility determinations are peculiarly within the province of the Trial Examiner and the Board and will not be overturned except in extraordinary circumstances. *N.L.R.B. v. Walton Mfg. Corp.*, 369 U.S. 404, 407-408; *N.L.R.B. v. Luisi Truck Lines, supra*, 384 F.2d at 846 (C.A. 9); *N.L.R.B. v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377, 381 (C.A. 9). Sloane testified that he told employees that

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[22]The Company's reliance (Br. 59-64) on *Bauer Welding & Metal Fabricators, Inc. v. N.L.R.B.*, 358 F.2d 766 (C.A. 8), is misplaced. Unlike here, the union campaign was conducted "entirely by mail" (*id.* at 768), the cards were rendered ambiguous because they were attached to a letter to all employees which stated in "plain terms" that the cards "would only authorize [the Board] to conduct a secret election" (*id.* at 774) and the employees thereafter signed the cards. Here, the Union's circulars stated a lawful purpose for the cards and were distributed at a time when they could not have influenced the cards signed by the employees here, which were, in any event, clear on their face. See *Bryant Chucking Grinder Co. v. N.L.R.B., supra*, 389 F.2d at 571. Compare, *Matthews & Co. v. N.L.R.B., supra*, 354 F.2d at 436-438.

the Union would demand recognition on the basis of the cards, but that in all probability the Company would refuse to bargain and an election would be necessary (*supra*, pp. 3-4). He was corroborated by other testimony. Thus, employee Booze testified, "Mr. Sloane made the statement that if we had enough cards these cards would be presented to the Company and the Company would turn it down, and at that time we would have an election" (Tr. 1433). Employee Williams testified that Sloane said the Union needed "30 per cent for an election and if they got 50 plus one, they didn't have to have an election" (Tr. 468). And employee Garger testified that Sloane said that "at least 30 or 33 per cent was required for an election" and he "had an idea" that Sloane said the Union could represent the employees without an election (Tr. 1518) (see also, Tr. 530-531). Contrary testimony cited by the Company at pp. 40-46 of its brief was discredited by the Examiner and the Board (see discussion and cases cited *infra* pp. 42-46). In these circumstances, the Board properly credited Sloane whose statements were correct representations of the law. See, *N.L.R.B. v. Geigy Co., supra,* 211 F.2d at 556; *Matthews v. N.L.R.B., supra,* 354 F.2d at 437; *Atlas Engine Works, Inc. v. N.L.R.B., supra,* 68 LRRM at 2636.

The Company's further attempt to show that individual Union solicitation vitiated all of the cards (Br. 46-51) or some of the cards (Br. 52-59) is patently without merit. The Company attacks 19 cards and since the Union's majority would remain intact if 58 of the 68 cards are valid, the Company must show that at least 10 were rendered invalid. However, many of the employees whose cards are attacked voluntarily attended one or more union meetings and thus were obviously much more interested in the union than an employee, who, for example, may have

signed in the plant but never attended any meetings.[23] Moreover, in several cases (Polony, Christenson, Virgil), the testimony shows that statements about an election were made by unidentified persons or were the source of rumor in the plant (Tr. 1373-1374, 380-381, 1465), neither of which can be attributable to the Union so as to invalidate the cards. See *Matthews v. N.L.R.B., supra,* 354 F.2d at 437-438; *Furr's, Inc. v. N.L.R.B., supra,* 381 F.2d at 568, n. 14.

In any event, the evidence cited by the Company does not show that the Union represented that the cards were only for an election and not for authorization. It must be pointed out that the employees read the authorization cards or had them explained and that none of the employees asked the Union or its solicitors for the return of their cards after the recognition request.[24] In some cases (Booze, Cisneros, Cuda, Dellomes, Garger, Kofink, Lawrence, and Weymar) the cards were signed at the union meeting where Sloane properly explained the use of the cards (*supra,* p. 40). In others (Knowles, Homnan, and Virgil) the testimony indicates that the solicitor mentioned that the cards could be used for recognition, as well as an election--a truthful statement of the law.[25] As to other

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[23]The Charging Party's Exhibit No. 2 lists some of these employees as having attended the March 14 meeting, *after* they signed their cards.

[24]Contrary to the Company's brief (Br. 52, 55, 57, 58), the testimony of employees Proudfoot (Tr. 486), Dellomes (Tr. 1364-1366), Lawrence (Tr. 1483-1484), and Rhedin (Tr. 1450) shows that they did indeed read their cards before signing.

[25]Employee Knowles testified that he was told by the employee who solicited him that "he wanted to unionize the tool and die industry in Southern California and I told him I would . . . [and] as near as I can remember, we wanted an election for union representation" (Tr. 423). Employee Virgil testified that the person who gave him his card that it could be used "for either an election or . . . allowing the Union to come in" (Tr. 383). Employee Homnan, who was given a card by Anathaiwongs (*supra,* p. 33) testified he was not told of any election but simply that the card would allow "the Union [to] come in" (Tr. 499).

cards (Cheetham, Kuhmann, Proudfoot, Cuda, Vogl), the Company cites no evidence that solicitors made any representations to the employees whatsoever.[26]

In view of the above, and his opportunity to pass on the demeanor of the witnesses, the Examiner properly discredited any testimony which might suggest that Union agents told employees that the only purpose of the cards was for an election (R. 29). See, *Matthews v. N.L.R.B., supra,* 354 F.2d at 436-438; *N.L.R.B. v. Security Plating, supra,* 356 F.2d at 726-727; *N.L.R.B. v. Consolidated Rendering Co.,* 386 F.2d 699, 702 (C.A. 2).[27]

Although the Company concedes that a showing of misrepresentation must be based upon "what was said" to employees (Br. 29), it is signifi-

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[26]This leaves the cards of three employees (Garrett, Rhedin, and Christenson) concerning which there was testimony that the employees were told by an identified solicitor that the cards would be used to obtain an election. But the testimony does not show that they were told that the cards did not authorize bargaining, as stated on the cards or that the only purpose of the cards was for an election. See, *Bryant Chucking Grinder v. N.L.R.B., supra,* 389 F.2d at 568. For example, although Christenson testified on direct that he was told the cards would be used for an election, on cross-examination, he attributed those statements to "conversation . . . in the shop" (Tr. 1465). Garrett testified that the person who solicited him told him to do "what I thought was right" (Tr. 1420) and he signed the card in the "privacy of [his] home" after reading it (Tr. 1423). Rhedin could not recall all of what the solicitor told him (Tr. 1452), but he too signed his card in private—at the noon break (Tr. 1453). See *N.L.R.B. v. Consolidated Rendering Co.,* 386 F.2d 699, 702 (C.A. 2). Finally, even assuming that these three cards were invalid, they did not affect the Union's majority (*id.* at 703).

[27]Also rejected was testimony cited by the Company (Br. 48-49) as to the solicitation of four other employees (Hunt, Mancini, Mansfield, and Mellone). These employees did not sign cards counted by the Board towards the Union's majority. Indeed Hunt testified he was told that the purpose of the cards was "getting a union in the shop" (Tr. 1475). Mansfield's testimony referred only to unidentified rumors of an election (Tr. 627).

cant that the Company relies upon testimony which reflects the subjective intent of card signers—over a year after the cards were signed, after an election campaign and after the employees had been subjected to coercive employer action. Such testimony is ordinarily not admissible, and may not be used to vitiate clear authorizations. For "an employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought the card meant cannot negative the overt action of having signed a card designating a union as bargaining agent." *Joy Silk Mills v. N.L.R.B.*, 185 F.2d 732, 743 (C.A. D.C.), cert. denied, 341 U.S. 914.[28] Testimony of this sort, even if it refers to what solicitors allegedly told employees, is suspect not only because of the passage of time but because an employer's unfair labor practices may have had their intended effect, namely, a change of heart by the card signers.[29] As the District of Columbia Circuit recently observed:

> . . . we have here the classic case of employees testifying under the eye of the company officials about events which occurred almost a year before and prior to the activities which were subsequently found to constitute unfair labor practices. It is certainly conceivable that those same threats and benefits which shook an employee's original support for the union also altered that employee's memory as to

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[28]See also, *N.L.R.B. v. Sunshine Mining Co.*, 110 F.2d 780, 790 (C.A. 9), cert. denied, 312 U.S. 678; *N.L.R.B. v. Geigy Co., supra,* 211 F.2d at 556; *Matthews v. N.L.R.B., supra; N.L.R.B. v. Gotham Shoe Mfg. Co.*, 359 F.2d 684 (C.A. 2); *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F.2d 917, 920 (C.A. 6); *N.L.R.B. v. Gordon Mfg. Co., supra,* __ F.2d at __, 68 LRRM at 2458; *N.L.R.B. v. Gorbea, Perez & Morell,* 300 F.2d 886, 887 (C.A. 1). But see, *N.L.R.B. v. Southland Paint Co.*, 68 LRRM 2169 (C.A. 5); *Crawford Mfg. Co. v. N.L.R.B., supra,* 386 F.2d 367.

[29]See *N.L.R.B. v. Bradford Dyeing Ass'n,* 310 U.S. 318, 339-340; *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 687; *N.L.R.B. v. Geigy Co., supra* at 556; *N.L.R.B. v. Quality Markets, Inc.*, 387 F.2d 20, 23 (C.A. 3); cf. *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 705.

events which occurred before the presentation of such threats and benefits.

United Automobile Workers (Preston Products Co., Inc.) v. N.L.R.B., supra, 392 F.2d at 807-808. Accord: *N.L.R.B. v. Southbridge Sheet Metal Works, supra,* 380 F.2d at 855 (C.A. 1). See also, *N.L.R.B. v. Sunshine Mining Co.,* 110 F.2d 780, 790 (C.A. 9), cert. denied, 312 U.S. 678.

This rationale is particularly applicable here because the Company apparently undertook to induce favorable testimony as to the card signings just 2 or 3 weeks before the hearing. On April 5, 1966, the Company sent letters to all employees denouncing the anticipated use of the authorization cards at the Board hearing and stating, contrary to the law (*supra,* p. 35), that the "only true way" of determining union representation was by a Board election (G.C. 23, Tr. 973). The Company also enclosed a questionaire, asking employees to indicate which of several reasons was the "true reason" they signed cards. None of the listed reasons was the one stated on the card—union authorization for bargaining (G.C. 23, Tr. 538-539, 510, 487, 641-642). On April 12, 1966, the Company sent another letter to employees, stating that the responses indicated that most employees did not even sign cards and those who did, did not intend to give the Union authorization to bargain, that they "were told that . . . the purpose of the cards" was to have an election (G.C. 24). Vice-President Fink, who sent the letter, admitted he had no knowledge of the truth of these representations (Tr. 978, 984-985, 973, 981). The letter also stated that the card signers would be questioned at the hearing as to "whether you were told by the Union . . . that the purpose was to have an election" (G.C. 24). In addition, Personnel Manager Berno approached several employees shortly before the hearing and questioned

them as to why they had signed cards (Tr. 367-370, 532-536, 639-642). Berno prepared a statement for employee Virgil to sign stating that he had signed a card "under pressure or a strain of some type"—which was clearly incorrect (Tr. 370). Another employee who "changed his mind" on the Union signed a statement, prepared by Berno, in Berno's office the night before he testified at the hearing (Tr. 532-533, 536). Such action by the Company, although not found to be a violation of the Act, undoubtedly affected the testimony of employees concerning the cards. It is the very same type of conduct which was condemned long ago by the District of Columbia Circuit in *Joy Silk Mills v. N.L.R.B., supra,* 185 F.2d at 743.

In these circumstances, the Board was not required to place reliance upon any evidence suggesting that employees had second thoughts about their actions in signing plain authorization cards. As the Examiner pointed out (R. 29), these were intelligent employees who knew what they were signing and, as we have shown, there was no *competent* evidence that the cards were signed because of union misrepresentations of purpose which would vitiate the cards. The Company's solicitude for "employees' rights" in its brief to this Court (Br. 7) must sound hollow indeed to the employees who were subjected to the Company's misconduct. As Judge Sobeloff has stated, "'Crocodile tears' shed by an employer over the loss of his employees' free and untrammeled choice after he has violated either Section 8(a)(1) or (3) or both should not impress us." *N.L.R.B. v. Sehon Stevenson & Co.,* 386 F.2d 551, 557 (C.A. 4) (concurring opinion). "By the time of the hearing the employees may well have changed their mind with respect to union affiliation, but the crucial question . . . is whether the union had the support of a majority of the employees . . . at the time the [bargaining] request was made, and not whether that support remains intact some

ten months later." *United Automobile Workers v. N.L.R.B., supra,* 392 F.2d at 808.[30]

B. The Company's refusal was not motivated by a good-faith doubt of the Union's majority

It is settled that, while an employer may properly refuse to bargain with a union if it doubts in good faith that the union has the support of a majority of the employees, the alleged doubt must not only be based on reasonable grounds but it must be the real reason for the employer's refusal to recognize the union. *N.L.R.B. v. Luisi Truck Lines, supra,* 384 F.2d at 847 (C.A. 9). Accord: *N.L.R.B. v. Austin Powder Co.,* 350 F.2d 973, 977 (C.A. 6); *N.L.R.B. v. Quality Markets,* 387 F.2d 20, 23-24 (C.A. 3); *Joy Silk Mills v. N.L.R.B., supra,* 185 F.2d at 741-742 (C.A. D.C.). Here, as we show below, substantial evidence supports the Board's conclusion that the Company's refusal was not based on a good-faith doubt of the Union's majority but rather on a "desire to forestall collective bargaining and provide an opportunity to undermine the union's majority status and rid the Company of the union." *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 727.

As shown in the Counterstatement (*supra,* p. 9), the Company's response to the Union's demand indicated it had no knowledge concerning the circumstances under which the Union's cards "may have been ob-

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[30]Nor are the cards of foreign-born or foreign-speaking employees invalid as such (Br. 65). *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 726-727 (C.A. 9). Here, as in *Security Plating,* the employees either read the cards of had them explained (Tr. 502, 562, 486, 552, 514, 497). All of the employees testified in English and most had been in this country for some time.

ained." Yet, the Company refused to bargain and also refused the Union's offer of a card check by an impartial third party. The Company thus "chose not to learn the facts [and] it 'took the chance of what they might be.'" *Matthews v. N.L.R.B., supra,* 354 F.2d at 439, quoting from *N.L.R.B. v. Elliott-Williams Co.,* 345 F.2d 460 (C.A. 7). The Board could properly find such evidence "inconsistent with the assertion of good faith" *N.L.R.B. v. Ralph Printing & Lithographing Co., supra,* 379 F.2d at 693.[31]

Also inconsistent with good faith was the Company's pervasive unlawful activity which reveals a determination not to accept union representation under any circumstances. As the Board found (R. 30), the Company "saw the Union as a threat to its way of dealing with its employees" and refused to accept "the thought that the employees might desire to have Union representation." As soon as it learned the Union was making headway in organizing its employees the Company sought to undermine it by granting wage increases and forming its own grievance committee so that problems could be solved "among ourselves" (Tr. 36). After it received word of the Union's majority it "continu[ed] to deal with the management dominated committee" (*N.L.R.B. v. H & H Plastics Mfg. Co., supra,* 389 F.2d 678, 683) and later discharged two leading union advocates. The Company also raised fears of economic reprisal if the Union won the

[31] Of course, where an employer has tangible evidence of widespread card improprieties and has communicated this to the Union, the Company's refusal to participate in a card check may not carry adverse connotations. Cf. *N.L.R.B. v. Logan Packing Co.,* 386 F.2d 562, 565 (C.A. 4) (*dictum*), relied on by the Company (Br. 24-26). But where, as here, the objective evidence indicates no rational basis for doubting the Union's majority, the refusal to participate in a card check is telling evidence of the Company's motivation, unaffected by subsequent investigation and arguments of counsel. See, *N.L.R.B. v. Sehon Stevenson & Co., supra,* 386 F.2d at 554-556 (concurring opinion of Judge Sobeloff); *Snow v. N.L.R.B., supra,* 308 F.2d at 692.

election and made reckless and unsubstantiated representations that three companies in the area had closed down because of the Union (*supra,* p. 21). On the basis of this pattern of unlawful conduct, the Board, as this and other courts have held, could reasonably conclude that the Company's refusal to recognize the Union stemmed not from a good faith doubt of its majority status but from a total rejection of the principle of collective bargaining. *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 727 (C.A. 9). See also, *N.L.R.B. v. Luisi Truck Lines, supra,* 384 F.2d at 847; *N.L.R.B. v. Geigy Co., supra,* 211 F.2d at 556; *Matthews v. N.L.R.B., supra,* 354 F.2d at 439; *Joy Silk Mills v. N.L.R.B., supra,* 185 F.2d at 741-742; *N.L.R.B. v. Quality Markets, Inc., supra,* 387 F.2d at 23-26 (C.A. 3); *N.L.R.B. v. H & H Plastics Mfg. Co., supra,* 389 F.2d at 683-684; *N.L.R.B. v. Goodyear Tire & Rubber Co., supra,* 68 LRRM at 2138; *N.L.R.B. v. Big Ben Department Stores, Inc.,* F.2d , 68 LRRM 2311, 2314 (C.A. 2); *N.L.R.B. v. Atco Surgical Supports, Inc., supra,* 68 LRRM at 2201.[32]

[32]The cases cited by the Company at pp. 68-69 of its brief are not to the contrary and are distinguishable on their facts. In *N.L.R.B. v. Johnnie's Poultry Co.,* 344 F.2d 617 (C.A. 8), and *N.L.R.B. v. Morris Novelty Co.,* 378 F.2d 1000 (C.A. 8) there were no unfair labor practices at the time of organizational activity. Compare the Eighth Circuit case of *N.L.R.B. v. Ralph Printing Co., supra,* 379 F.2d 687, 693. In *Lane Drug Co. v. N.L.R.B.,* 391 F.2d 812 (C.A. 6) the Union's demand was not clear and the employer had had prior experience with an unsuccessful claim by the same Union; in *Peoples Service Drug Stores, Inc. v. N.L.R.B.,* 375 F.2d 551 (C.A. 6) the only unfair labor practices were coercive statements from minor supervisors not authorized by "top management"; and in *N.L.R.B. v. Shelby Mfg. Co.,* 390 F.2d 595 (C.A. 6), the cards used by the Union to present its majority claim were ambiguous on their face and could not support a bargaining order. Compare the recent Sixth Circuit cases of *N.L.R.B. v. H & H Plastics, supra; N.L.R.B. v. Atco Surgical Supports, Inc., supra,* and *Atlas Engine Works, Inc. v. N.L.R.B., supra,* where unfair labor practices similar though much less pervasive than here were held properly to support a finding of an absence of good faith doubt. In *N.L.R.B. v. Flomatic Corp.,* 347 F.2d 74 (C.A. 2), there was an improper bargaining demand made by the Union and minimal unfair labor practices; and *Textile Workers Union v. N.L.R.B. (J.P. Stevens),* 380 F.2d 292 (C.A. 2), cert. de-

Contrary to the Company's contention (Br. 76) the Trial Examiner and the Board did reject testimony indicating that the Company had a good faith doubt of majority. As the Examiner stated, "I find that the respondent at no time took an introspective view to discover whether it had a good faith doubt or a doubt of any sort concerning the majority status of the Union" (R. 30). This determination is, of course, supported by the Company's misconduct, discussed above, which speaks more objectively than its words. It is also significant that the alleged discussion between Fink and Howland analyzing employee sentiment on the Union was held the night before receipt of the Union's demand in circumstances which cannot be contradicted by direct evidence. Such testimony is thus of little value in resolving the issue of motivation. See, *N.L.R.B. v. Laars Engineers, Inc., supra,* 332 F.2d at 667. In any event, the testimony does not establish that the Company had a good faith doubt of the Union's majority or that its refusal to bargain was based on such doubts. The Company admittedly had no knowledge at this time of anything which would impugn the Union's card majority. See *N.L.R.B. v. H & H Plastics Mfg. Co., supra,* 389 F.2d at 678. Fink and Howland had no evidence at the time of their discussion that the Union overreached in obtaining cards: they did not discuss "who signed a card or didn't sign a card" (Tr. 926).

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nied, 389 U.S. 1005, did not involve Section 8(a)(5) of the Act at all. In *N.L.R.B. v. River Togs, Inc.,* 382 F.2d 198 (C.A. 2), the unfair labor practices were minimal—three coercive statements. Compare the Second Circuit's decisions in *N.L.R.B. v. Consolidated Rendering Co., supra; Bryant Chucking Grinder Co., supra,* and *N.L.R.B. v. Big Ben Department Stores, Inc., supra.* Judge Friendly, who authored *River Togs,* recognizes that the commission of unfair labor practices bears on whether an employer's doubts as to the Union's majority provides a "substantial reason for [his] refusal to recognize the union rather than simply an excuse later manufactured for a position he would have taken in any event. . . ." *N.L.R.B. v. United Mineral & Chem. Corp.,* 391 F.2d 829, 838 (C.A. 2).

Moreover, the Company's alleged assessment of union strength was rather imprecisely measured by its own illegal questioning of employees; the responses were undoubtedly affected by the coercive interrogations. Naturally, the Company's unlawful activities may have shaken or diluted the Union's majority support. But, in view of its misconduct, the Company may not rely on manufactured doubts "based on . . . [the] knowledge that its illegal tactics had been at least partially successful." *N.L.R.B. v. Quality Markets, Inc., supra,* 387 F.2d at 24. Accord: *N.L.R.B. v. Geigy Co., supra,* 211 F.2d at 556.[33]

C. The Board's bargaining order was a proper remedy

In the circumstances of this case, the Board reasonably ordered the Company to bargain with the Union upon request. As shown above (*supra,* pp. 31-32), a bargaining order is the usual remedy for the violation of Section 8(a)(5) even though the Union has lost an election subsequently held to be invalid. In the instant case, the Board necessarily set aside the election because of the Company's pre-election misconduct, an action not questioned by the Company here. The Company's unfair labor practices manifestly interfered with the free choice of employees. In these circumstances, it was within the Board's remedial discretion to conclude that the Company's interferences with employee rights could best be remedied by a bargaining order rather than the holding of a second election. *N.L.R.B. v. Luisi, supra,* 384 F.2d at 847-848. Requiring a second election and the posting of a notice would hardly dissipate the effects of the Company's

[33]Nor does the Company advance its case by contending that its refusal to bargain was made on the advice of counsel (Br. 79). Company counsel Gould did not testify in this case. The only evidence that cards were discussed at this time was that Fink told Gould that he *heard* that one employee signed to be put on a mailing list (Tr. 886-887), and that Howland had "information that one or two employees had signed cards for other reasons than to be represented" (Tr. 1175). Fink admitted there

action. On the other hand a bargaining order vindicates the rights of employees, a majority of whom had effectively selected the Union as their bargaining agent. It also blunts the possibility that an employer may profit from his unlawful subversion of the election process. Indeed, where, as here, the Union loses its majority status as a result of the employer's unfair labor practices, many courts have found a bargaining order appropriate even where there has been no technical refusal to bargain. See, *Wausau Steel Corp. v. N.L.R.B., supra,* 377 F.2d at 372-374; *Piasecki Aircraft Corp. v. N.L.R.B.,* 280 F.2d 575, 591-592 (C.A. 3), cert. denied, 364 U.S. 933; *Editorial "El Imparcial", Inc. v. N.L.R.B.,* 278 F.2d 184, 187 (C.A. 1); *United Steelworkers of America (Northwest Engineering Co.) v. N.L.R.B.,* 376 F.2d 770, 772-773 (C.A.D.C.), cert. denied, 389 U.S. 932; *Local No. 152, Teamsters Union v. N.L.R.B.,* 343 F.2d 307, 309 (C.A.D.C.); *N.L.R.B. v. Delight Bakery, Inc.,* 353 F.2d 344, 347 (C.A. 6); *D.H. Holmes Co. v. N.L.R.B.,* 179 F.2d 876, 879-880 (C.A. 5); *N.L.R.B. v. Caldarera,* 209 F.2d 265, 268-269 (C.A. 8); *J.C. Penney Co. v. N.L.R.B.,* 384 F.2d 479, 486 (C.A. 10).

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was no detailed discussion of individuals (Tr. 889); and the Company did not contact the Union about a card check. In these circumstances, the Company's evidence falls far short of establishing a good faith doubt of majority in a unit of 114 employees. See *N.L.R.B. v. H & H Plastics, supra,* 389 F.2d at 683.

CONCLUSION

For the reasons stated, the petition to review should be denied and the Board's order should be enforced in full.

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APPENDIX

In addition to the statutory appendix in the Company's brief, we consider the following provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs 151, *et seq.*) to be relevant:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

REPRESENTATIVES AND ELECTIONS

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the

rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reason-

able cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decisions shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

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PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such

person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.